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STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(RICHARD ALLEN GRIFFIN, P.J, JANET T. NEFF and HELENE T. WHITE, J.J.)
AND THE WORKER'S COMPENSATION APPELLATE COMMISSION

RONALD G. SWEATT,

Plaintiff-Appellee

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellant.
_____/

Supreme Court No. 120220

Court of Appeals No. 226194

Lower Court No. WCAC 99-0026

REPLY BRIEF OF DEFENDANT-APPELLANT, DEPARTMENT OF CORRECTIONS

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STATEMENT OF QUESTION INVOLVED

Does this case turn on the question posed in the statute, not on the re-casting of that question as posed by plaintiff and his *amicus curiae*? And, is the statutory inquiry into whether plaintiff is "unable to perform work" to be understood with reference to what precedes and follows that phrase in § 361(1)?

STATEMENT OF FACTS

(Numbers in parentheses refer to the pages of Appellant's Appendix.)

Plaintiff-appellee has filed his brief in the above-captioned case and the Court has permitted the filing of a brief by *amicus curiae* the law firm of Libner, VanLeuven, Evans, Portenga & Slater, P.C. *Amicus curiae* has also filed a supplement to its *amicus curiae* brief. This is defendant's reply.

ARGUMENT

This case turns on the question posed in the statute, not on the re-casting of the question as posed by plaintiff and his *amicus curiae*. And, the statutory inquiry into whether plaintiff is "unable to perform work" must be understood with reference to what precedes and follows that phrase in § 361(1).

It is important to remain focused on the statutory question posed, not on plaintiff's and his *amicus curiae*'s re-casting of the question posed. The question asked in the last sentence of MCL 418.361(1) is whether:

> . . . the employee is unable to obtain or perform work because of imprisonment or commission of a crime.

The instant plaintiff is "unable to obtain or perform work because of . . . commission of a crime." He is unable to obtain or perform work for defendant because of his felony conviction for delivery of heroin. See, MCL 791.205a(1).

The arguments of plaintiff and *amicus curiae*, in effect, re-cast the statutory question to inquire:

- Is "the employee unable to obtain or perform *all* work because of imprisonment or commission of a crime"?

The word "all" does not appear in the last sentence of § 361(1). And, to re-cast the question in this way, in effect, changes the statutory question to:

> Is plaintiff still able to work someplace *despite* imprisonment or commission of a crime?

The Court should not read the word "all" into the statute and thereby change the question posed. That plaintiff and his *amicus curiae* misread the exemption can be confirmed upon: (1) consideration of the entire context of the statute; (2) consideration of the Legislature's reasons

for creating the statutory exemption; and, (3) consideration for the practical effect of the oppositions' viewpoint.

A. The Context And Setting For The Exemption.

A "statutory phrase is given meaning by its context or setting." *Tyler v Livonia Public Schools*, 459 Mich 382, 391; 590 NW2d 560 (1999); Singer, *Sutherland Statutory Construction*, § 46:05, pp 154 *et seq* (6th ed. 2000). Consider then the context and setting of § 361's exemption, including the two sentences which precede the final sentence of § 361 where the exemption appears. For easy reference, defendant repeats the entire § 361(1) here:

> While the incapacity for work resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage which the injured employee is able to earn after the personal injury, but not more than the maximum weekly rate of compensation, as determined under section 355. Compensation shall be paid for the duration of the disability. However, an employer shall not be liable for compensation under section 351, 371(1), or this subsection for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime.

Given the progressive arrangement of the statute, two things are already a "given" by the time one reaches the exemption question in the third sentence. First, it has already been determined that "the injured employee is able to earn after the personal injury." (First sentence). Therefore, the employee is not unable to obtain or perform *all* work post-injury. Second, it has already been determined the employee is unable to obtain or perform some work "resulting from a personal injury" at the workplace. (*Id.*) Therefore, the third sentence's consideration is whether some work is *also* foreclosed "because of imprisonment or commission of a crime."

For these reasons, the exemption cannot be understood to mean the employee must be unable to obtain or perform all work post-injury. A partially disabled person under the first sentence of § 361(1) is, by definition, still able to perform some work, yet the Legislature has said in the third sentence the employer is exempt from partial disability payments.

The unsoundness of the oppositions' argument is best exemplified by plaintiff's concession: "The employee is not seeking benefits for the period of time that he was incarcerated," (plaintiff's brief, p 12), even though "[d]uring his incarceration, plaintiff was employed." (*Id.* at p 4). By acknowledging defendant is exempt from liability while plaintiff was incarcerated yet working, plaintiff inadvertently recognizes it is not a condition precedent that he be unable to obtain or perform *all* work before the exemption applies.

Just as what precedes the phrase "unable to obtain or perform work" is important, so too is what follows the phrase. Compare, *Robertson v DaimlerChrysler Corp,* 465 Mich 732; 641 NW2d 567 (2002). Inability to obtain or perform work must be "because of" imprisonment or commission of a crime, not "because of" some other reason. Once this is understood, the hypothetical situations posed by plaintiff's *amicus curiae* are answered.

Specifically, plaintiff's *amicus curiae* offers a hypothetical example where a high school dropout suffers a work injury, receives weekly workers' compensation benefits, and later commits a felony. The employer in the example invokes the exemption solely because commission of the felony precludes the dropout from working as an attorney (since attorneys cannot be felons).

Besides the unrealistic nature of this hypothetical example, plaintiff's *amicus curiae* fails to appreciate the "because of imprisonment or commission of a crime" phrase which follows the requirement that the employee be "unable to obtain or perform work." The exemption from liability would be inapplicable in the example because the employee is unable to obtain or perform

attorney work "because of" a lack of a law degree and law license, not "because of" commission of a crime.[1] The "because of" causal connection requirement in the statutory exemption thus resolves the plaintiff's *amicus curiae*'s concern.

The Court should also appreciate the legislative breadth of the exemption because it sheds light on the Legislature's intent. The exemption applies to employees receiving total disability benefits under § 351, as well as those partially disabled under § 361(1).[2] To be totally disabled, an employee must be unable to obtain or perform all work within his or her qualifications and training. See, *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002). Even in that circumstance, the Legislature exempts the employer from liability should the employee also be unable to obtain or perform work because of imprisonment or commission of a crime. The Legislature thus intends the exemption to sweep wide.

B. Rationales For The Exemption.

The impetus for passage of the exemption contravenes the oppositions' arguments as well. One legislative rationale for the exemption has been stated as:

> Here, the intent of subsection 361(1) appears to be to deny benefits to those injured employees whose incarceration is an impediment to employment. Such employees have, in effect, *removed themselves from the workforce* by committing a crime for which incarceration results. *Kelley v Desai*

[1] Plaintiff's *amicus curiae* poses another similar hypothetical situation, which garners the same response. The second hypothetical situation is a situation where an employee suffers a work injury, receives weekly workers' compensation benefits, and then commits a felony. His employer takes the position that since the felony precludes the employee from becoming a boxer, apparently because felons are not permitted to engage in boxing matches under state law, the exemption applies. The employee, however, has never been a boxer, nor has he ever had the abilities or prospects of becoming a boxer. The exemption would not apply in such a situation because the hypothetical employee's inability to obtain or perform work as a boxer is not "because of" his commission of a crime but "because of" the fact he is (and always has been) unfit to be a boxer.

[2] As mentioned in defendant's primary brief, the Legislature also mentions Section 371(1). MCL 418.371(1). Section 371(1) is the starting point for determining whether a person is totally or partially disabled. Section 371(1) begins the weekly payment calculation process for disability by asking the threshold question of what is "the proportionate extent of the impairment of the employee's earning capacity". MCL 418.371(1) [first sentence]. If the extent of impairment is one hundred percent, then the employee is totally disabled under Section 351. If the proportionate extent is less than a hundred percent, then the employee is partially disabled under Section 361(1).

Construction, Inc, 2000 ACO Op #626; 2000 Mich WCACA 2436, 2438; 14 MIWCLR 1227 (2000).

This rationale correctly recognizes weekly benefits are wage replacement benefits. See *e.g.*, *Pulley v Detroit Engineering & Machine Co*, 378 Mich 418; 145 NW2d 40 (1966). Where the employee would not be earning wages for the injury-employer anyway because of imprisonment or commission of a crime, there are no wages to replace. Compare, *Sington v Chrysler Corp*, 467 Mich 144, 160; 648 NW2d 624 (2002) ["For example, an employee might suffer a serious work-related injury on the last day before the employee was scheduled to retire with a firm intention to never work again. In such a circumstance, the employee would have suffered a disability, i.e., a reduction in wage earning capacity, but no wage loss because, even if the injury had not occurred, the employee would not have earned any further wages."].

Another rationale for § 361(1) is its intended cure for such cases as *Sims v R D Brooks, Inc*, 389 Mich 91; 204 NW2d 139 (1973). In *Sims*, the Court permitted a person imprisoned for a conviction of rape to continue to receive weekly workers' compensation benefits. Amongst the reasons offered for that holding was:

> Defendants contend however, that plaintiff's imprisonment prevents his employment in some favored capacity. It is argued that this thwarts the rehabilitative and mitigatory aspects of workmen's compensation. *In this case even though some testimony indicated that plaintiff would have been able to perform some favored employment*, and that such employment would have been therapeutic, *favored employment was never offered to plaintiff.* We therefore need not reach the question whether there was an amount which plaintiff was "able to earn" within the meaning of the statute. *Sims*, *supra* at 94.

The decisions below in this matter award benefits "even though testimony indicated that plaintiff would have been able to perform some favored employment". The decisions below award benefits,

like *Sims*, by finding the proofs insufficient to show favored employment would have actually been offered.[3] Therefore, to affirm the reasoning below is to say the present statutory inquiry remains the *Sims*' inquiry, *i.e.*:

> However, an employer shall not be liable for compensation under sections 351, 371(1), or this subsection for such periods of time *where the employer sufficiently proves that but-for commission of a crime the employer would have made an offer of reasonable employment to employee.*

(See, 63a and 91a).[4]

Such a reading frustrates the Legislature's antidote for *Sims*. Such a reading also assumes the Legislature directed workers' compensation factfinders to engage in multiple level speculation. The factfinders are being asked to determine whether the employer "would have" done something "if" the law had been different. (87a). The Court should not assume the Legislature designed a statute to require levels of speculation. Speculation has never been an acceptable basis for factfinding in workers' compensation. *E.g.*, *Wiltse v Borden's Farm Products Co*, 328 Mich 257; 43 NW2d 842 (1950).

C. Practicalities.

The statutory exemption would scarcely apply, if at all, under the oppositions' view that incarceration and commission of a crime must foreclose all post-injury work. An ex-felon's ability to obtain or perform work anywhere - *e.g.* at an odd job, at work with an employer who makes no criminal record inquiry, *etc.* - would defeat the exemption.

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[3] "Favored work" had been loosely defined as accommodated work offered an injured employee by the injury employer to mitigate its liability. "Favored work" is now more properly known as "reasonable employment" under MCL 418.301(5)-(9). *Perez v Keeler Brass Co*, 461 Mich 602; 608 NW2d 45 (2000).

[4] The Commission's view has not been entirely consistent. Contrast this case with *Kelley*, *supra*, for example.

Yet, the legislative thrust of the exemption is broad and deep - applying even to the totally disabled - not narrow and superficial.

D. A Factual Clarification.

On an unrelated matter, defendant wishes to address a factual point mentioned by plaintiff's brief, even though it has no bearing on the resolution of the issue before the Court. Plaintiff says in briefing that defendant at times mistakenly states it was plaintiff's commission of a crime which severed his employment with defendant. Plaintiff says his employment had already been severed prior to his commission of a crime. This factual point is "irrelevant", as the Worker's Compensation Appellate Commission noted (61a), because the only salient fact is: plaintiff was no longer employed by defendant when the Legislature enacted MCL 791.205. Therefore, the exact date when plaintiff's employment terminated, which was not entirely clear as the decisions below revealed (61a-62a), was not crucial then and is not crucial now because it has been conceded: plaintiff had been terminated prior to the Legislature's ban on hiring felons, which would necessitate a re-hire by defendant.

RELIEF SOUGHT

WHEREFORE, defendant-appellant, Department of Corrections, respectfully requests that the Supreme Court reverse the Court of Appeals and hold that plaintiff is not entitled to weekly benefits pursuant to MCL 418.361(1).

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